No. 74-694

Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1974

GENERAL STEEL PRODUCTS COMPANY
A DIVISION OF THE SENG COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The opinion of the Court of Appeals for the Fourth Circuit has not yet been reported. It is reprinted hereafter in Appendix p. 1 et seq. The Decision and Order of the National Labor Relations Board is reported at 207 NLRB No.112,

85 LRRM 1003 (Dec. 13, 1973) It is reprinted hereafter beginning at Appendix p. 10.

JURISDICTION OF THIS COURT:

The case was decided by the Court of Appeals and decree of enforcement entered October 1, 1974. Petition for Rehearing was denied November 4, 1974. This Court has jurisdiction to review the decision of the Court of Appeals by certiorari under Title 28 U.S.C. § 1254(1) and under Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151 et seq.).

QUESTION PRESENTED

The question is whether the National Labor Relations Board has power under the National Labor Relations Act to conduct employee elections on its own motion--in this case by "reinstating" sua sponte a Petition filed by the union, which the Board had dismissed with apparent

finality more than six and one-half years before.

STATUTE INVOLVED

The authority of the National Labor Relations Board to order an election is contained in § 9(c)(1) of the National Labor Relations Act, 29 U.S.C. § 159(c)(1) which reads as follows:

> "(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--
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> "(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or
>
> "(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a

claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

STATEMENT OF CASE

On March 11, 1966 (157 NLRB 636, 61 LRRM 1417) the National Labor Relations Board (The Board) dismissed a petition for election among General Steel employees, which had previously been filed by the Upholsterers International Union of North America, AFL-CIO on August 14, 1964. The dismissal was in the following language:

"It is further ordered that the

> petition in Case No. 11-RC-2022 be, and it hereby is, dismissed, and all proceedings held in connection therewith be, and they hereby are, vacated."

At the same time, the Board ordered General Steel to recognize and bargain with the Union without any election.

On October 19, 1972 (199 NLRB No. 121, 81 LRRM 1513), more than six and one-half years after the dismissal and more than eight years after the petition was filed, the Board "reinstated" the same petition:

> "It is further ordered that the petition in Case 11-RC-2022 be and it hereby is, reinstated, and said case is hereby remanded to the Regional Director for Region 11 to conduct a new election."

No reason was given in the Board's decision for this action.[1/] Thereupon, an election was held,

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1/ During the intervening years the parties were in litigation over the propriety of the Board's bargaining order, including review by this Court, sub nom NLRB v. Gissel Packing Co. 395 U.S.

which the union won, but which was challenged by the employer on the basis of misconduct by the union and its supporters and on the ground that the Board had no statutory power to hold an election founded upon a long-dead petition which the Board had "reinstated" sua sponte.

The Union was certified, and in order to test the validity of this action of the Board,

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1/(cont.)
575, 23 L. Ed. 2d 547, 89 S. Ct. 1918 (1969), at which time the Board virtually abandoned its former approach to imposing recognition through bargaining orders. Following remand from this Court, (and subsequent mandate of the Fourth Circuit; see 180 NLRB No. 8, 72 LRRM 1579; 445 F. 2d 1350), the Board, applying the standards established by this Court in Gissel, determined that a bargaining order was not an appropriate remedy under the facts of the General Steel case, 199 NLRB No. 121, 81 LRRM 1513. The Board thereupon dismissed the charge of failure to bargain under Sec. 8(a)(5) of the Act. But the Board did not stop there. It then "reinstated" the old petition of the Upholsterers Union (without any new petition or motion from the union or the employer) and proceeded to hold a new election, and to certify the union on the basis of the result of this election.

General Steel declined to bargain with the union. The Board granted summary judgment against General Steel (on the basis of the record in the election case and without any hearing), finding that the employer had violated Section 8(a)(5) of the Act in refusing to bargain with the certified union.(207 NLRB No. 112, 85 LRRM 1003; Appendix p. 10) General Steel petitioned for review in the Court of Appeals for the Fourth Circuit and the Board filed a cross petition for enforcement of its order. Jurisdiction of the Court of Appeals was founded on Section 10(e) and (f) of the Act, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 160(e) and (f). The Court of Appeals enforced the Board's Order (Appendix p. 1 et seq.).

ARGUMENT

THE BOARD WAS WITHOUT POWER TO REINSTATE SUA SPONTE THE LONG-DEAD ELECTION PETITION AND TO HOLD A NEW ELECTION THEREON

This case presents an issue of significant judicial first impression: the asserted power of the Board sua sponte to order an election absent a pending election petition to raise a question of representation.

Section 9(c)(1) of the National Labor Relations Act, as amended, 29 U.S.C. §159(c)(1), requires, as a jurisdictional predicate for holding an election, that a petition for election be filed by an employee or group of employees or union acting on their behalf, or by an employer. The Board cannot initiate a petition. Therefore, absent a pending petition, or perhaps a prompt and timely motion to reinstate a previously dismissed petition, the Board has no

authority to order or hold an election.[2/]

Here, the Union's petition had been "dismissed" on March 11, 1966 (157 NLRB 636), six and a half years before it was purportedly reinstated. (It was filed more than eight years before, on August 14, 1964.) If there is such a thing as "finality" in administrative action, this was surely final. At no time did the Union protest the Board's action in dismissing its petition, nor did it any time thereafter petition

2/ The only other case of which we are aware in which the Board has undertaken, on its own motion, to reinstate a dismissed petition is New Alaska Development Corporation 194 NLRB No. 137 (1972), and as in the present case, the Board offered no reason. In Lufkin Foundry & Machine Co., 83 NLRB 768, 24 LRRM 1144 (1949), the Board permitted reinstatement of a dismissed petition because the dismissal had not yet become final. And in I. T. T. Semi-Conductors, Inc. 174 NLRB 656, 70 LRRM 1268 (1969), the union moved for reinstatement of a previously dismissed petition. This contrasts with numerous cases in which card-based bargaining orders were dismissed but the Board did not order any new election. Wholesalers Cooperative Trucking

for reinstatement of the petition or file a new petition.

The Board's Administrative Law Judge, who heard the case after remand from this Court and the Court of Appeals, did not recommend a new election (199 NLRB No. 121), there being no pending petition on which to base such an order. The first such action came from the Board itself, (199 NLRB No. 121). Its reinstatement on its own motion of the old petition, on October 19, 1972 (199 NLRB No. 121), served to bootstrap

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2/ (cont.)
Association 157 NLRB 1572; Photobell Company, Inc. 158 NLRB 738; Wagner Industrial Products Co. 162 NLRB 1349; Mace Food Stores, Inc. 162 NLRB 1605; Nalco Chemical Co. 163 NLRB 68; Shelby Williams of Tenn., Inc. 165 NLRB 737; 20th Century Glove Co. 165 NLRB 781; Ring Metals Co. 198 NLRB No. 143; Transway Corp. 198 NLRB No. 185; Wallace Metal Products 199 NLRB No. 127; Northeastern Dye Works 203 NLRB No. 159; Central Diagnostic Laboratory 206 NLRB No. 114.

its decision to direct a new election, which was not then being sought by either the union or the company. This, we say was in excess of its statutory authority.[3/]

In other cases, the Board has resisted efforts of Courts of Appeal to require a new election on remand, where the Court denied enforcement of a bargaining order. Peerless of America Inc. v. NLRB 484 F. 2d 1108 (7th Cir. 1973); Fort Smith Outerwear v. NLRB ___ F. 2d ___, 86 LRRM 2753 (8th Cir. 1974). In Peerless of America v. N. L. R. B., 484 F. 2d 1108, 83 LRRM 3000 (C. A.

3/ The Company pressed this issue before the Regional Director in its Objections and the Director summarily overruled the objection on the grounds that "the Employer cites no authority for its contention." And while the matter was vigorously pressed before the Board by the Company in opposition to summary judgment, the Board wholly ignored the issue in its decision and order. (App. p. 10) The Board's default with respect to this critical issue mandates definitive resolution by this Court.

7, 1973), the Board dismissed the union's election petition and sought judicial enforcement of a bargaining order. The Court denied enforcement of the bargaining order and added: "The case is otherwise remanded to the Board for the expeditious scheduling of a representation election." On recognition of this as an error, the Board's Associate General Counsel wrote the Court (Appendix p. 33)stating:

> "We would like to call the Court's attention to what we believe to be an error in the opinion. . . [t] he election petition filed by the Union involved in this case was dismissed by the Regional Director when the complaint issued in the unfair labor practice case. Thus, there is no election petition now pending in this matter . . . [t]he last sentence [of the opinion] should be stricken."

The Court responded by letter (Appendix p. 35) stating:

> "The panel did not realize that the election petition had been dismissed and that none is now pending."

It, accordingly, issued an order (Appendix p.37) striking from its opinion the direction to hold a new election. Substantially the same thing occurred in the Fort Smith case. The same result, it is submitted, is required here; for the implicit conclusion of the Court and the Board in Peerless and Fort Smith is that the Board lacks power to reinstate a previously dismissed petition. The resolution of the issue in these cases demonstrates the only tenable construction of the Act and, moreover, shows the Board's contrary action here to be arbitrary and capricious.[4/] It is submitted, the Board cannot arrogate unto itself the power to pick and choose those cases in which it wishes sua sponte to hold an election. Particularly apropos

4/ The Administrative Procedure Act, 5 U.S.C. §706 (2)(A) expressly empowers reviewing courts to set aside agency action which is arbitrary, capricious, or an abuse of discretion.

is Judge Friendly's observation in N. L. R. B. v. General Stencils, Inc., 438 F. 2d 894, 905, 76 LRRM 2288 (C. A. 2, 1971), that, "While the Board has wide discretion in framing remedies, the agency has a correlative duty to explain its imposition of a remedy in one case and its failure to do so in a seemingly similar ... one on a basis reviewing courts can understand."

Before the Court of Appeals the Board undertook to distinguish these inconsistent actions on the basis that election proceedings are not subject to direct review by the Courts. AFL v. NLRB, 308 U.S. 401, 84 L. Ed. 347, 60 S. Ct. 300 (1940). But the present case is not one for direct review of an election proceeding; it arises upon the subsequent refusal to bargain after certification, where the election proceeding is fully subject to review. Pittsburgh Plate Glass Company v. NLRB, 313 U.S. 146, 85 L. Ed. 1251,

61 S. Ct. 908 (1941) Moreover, the Board's resistance to court orders regarding rerun elections (on the ground that they are election matters) serves to emphasize that the Board regards this (properly) as part of its regular "election" function under Section 9(c) of the Act, and not a matter of further extraordinary "remedy" after a bargaining order has been denied enforcement.

Such being the case, the Board's powers to hold elections are governed by Section 9(c) and it cannot act on its own motion.

This is, of course, not to say that the union could not, subsequent to the judicial denial of the bargaining order, file a new petition. Indeed, the denial of a bargaining order was predicated on the availability of a fair election. The union could have petitioned for an election in this case, but it did not choose to do so, possibly because

it did not then consider itself ready. This election was the Board's doing, and the Board has persisted, notwithstanding the objections of the employer. Presumably the union is now cheerfully willing to accept the result in this instance; but the important thing is that the statutory scheme calls for holding elections only on the petition of one of the parties involved. This is an entirely sensible requirement, imposed by Congress. Failure of the Board to observe it, and its calling of an election at a time when neither party is asking for an election, is an abuse of administrative power.

We submit that, without affirmative action by an employee or the union or the employer in filing a new petition as required by Section 9(c)(1) of the Act, the Board was powerless to resurrect the defunct petition, and the ensuing election was therefore a nullity.

The decision of the Court of Appeals, enforcing the Board's order to bargain, amounts to an affirmation of the power of the Board to act sua sponte in holding elections. This is contrary to the statute and an extension of the Board's power into an area not permitted by Congress.

Petitioner respectfully moves that this Court issue Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to review its decision and order enforcing the decision of the National Labor Relations Board.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1077

GENERAL STEEL PRODUCTS,
A division of The Seng Company, Petitioner,

-v-

THE NATIONAL LABOR RELATIONS BOARD,
Respondent.

American Retail Federation, Amicus Curiae.

On Petition for Review of an Order of The National Labor Relations Board.

(Argued June 3, 1974. Decided October 1, 1974)

Appendix 1

BUTZNER, Circuit Judge:

The primary question raised by this review of a bargaining order is whether the National Labor Relations Board can reinstate a petition for a representation election that the Board dismissed when it erroneously entered an earlier bargaining order. We hold that the Board did not exceed its authority, and we enforce its order.

The Upholsterers' Union has been attempting since 1964 to establish itself as the employees' bargaining representative at General Steel Products Co. The following summary of earlier proceedings provides an understanding of the present controversy:

¶ In March 1966, the Board found that the company's unfair labor practices nullified its 1964 election victory and set aside the election. It also ruled that the company had violated §§8(a) (1) and (5) of the Act, entered a bargaining order based on signed authorization cards, and dismissed the

union's 1964 petition for an election.[1]

¶ In June 1968, this court, upon the company's petition for review, enforced the cease and desist order based on the violations of § 8(a) (1) but denied enforcement of the bargaining order.[2]

¶ In June 1969, the Supreme Court reversed our denial of enforcement of the bargaining order and remanded the case for the Board's reconsideration.[3]

¶ In December 1969, the Board, without a hearing, affirmed its issuance of a bargaining order.[4]

¶ In July 1971, this court again denied enforcement of the bargaining order and remanded the case for a hearing to determine, among other issues, whether a fair

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1. General Steel Products, Inc., 157 NLRB No. 59 (1966).

2. General Steel Products, Inc. v. NLRB, 398 F. 2d 339 (4th Cir. 1968).

3. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

4. General Steel Products, Inc., 180 NLRB No. 8 (1969).

election could be held.[5]

¶ In October 1972, the Board ruled that a bargaining order was unnecessary, reinstated the union's 1964 election petition, and directed a second election.[6]

¶ In December 1973, the Board summarily rejected the company's objections to the second election, which the union won, and entered the current bargaining order.[7]

We accept the company's major premise: the Board lacks statutory authority to order a representation election without an extant petition for an election.[8] We are not persuaded, however,

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5. General Steel Products, Inc. v. NLRB, 445 F. 2d 1350 (4th Cir. 1970).

6. General Steel Products Co., 199 NLRB No. 121 (1972).

7. General Steel Products Co., 207 NLRB No. 112 (1973).

8. The Board's authority to order an election is contained in § 9(c) (1) of the Act [29 U.S.C. § 159(c) (1) (1970)], which provides in part:

"Whenever a petition shall have been filed . . .

(A) by . . . a labor organization . . . or

(B) by an employer . . .

the Board shall investigate such petition and [if appropriate] direct an election by secret ballot. . ."

by the arguments that the company builds on this premise. They are (1) the Board lacked authority to reinstate the petition it dismissed in 1966, and (2) the Board acted arbitrarily because reinstatement is unprecedented and inconsistent with its previous positions.

The union's 1964 representation petition satisfied the Act's requirements and invoked the Board's power to order an election. The Board's subsequent entry of a bargaining order based on a card count, however, appeared to make the election petition superfluous and the Board dismissed it. When the bargaining order was ultimately determined to have been erroneously granted, the election petition became an appropriate instrument for determining the question of representation over which the parties had been continuously litigating.

The Board's correction of its error was not

limited to vacating the bargaining order which this court had declined to sustain. It could go further and reinstate the election petition which it had improvidently dismissed on the mistaken assumption that its bargaining order was enforceable. Mr. Justice Frankfurter stated the controlling principle of law in FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 145 (1940);

> "On review the court may . . . correct errors of law and on remand the Commission is bound to act upon the correction ... But an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge."

Contrary to the company's assertion, the Board's reinstatement of the petition does not lack precedent. Under circumstances substantially similar to those found here, the Board reinstated a petition and ordered a second election in New Alaska Development Corp., 194

NLRB No. 137 (1972).

Nor is the Board's ruling inconsistent with the position that it took in Peerless of America, Inc. v. NLRB, 484 F. 2d 1108 (7th Cir. 1973) and Ft. Smith Outerwear v. NLRB, ____ F. 2d ___, (8th Cir. 1974), where, in unreported motions, it questioned the statutory authority of a reviewing court to order an election on a dismissed petition.[9] We, however, are not faced with this issue. Neither our remand in General Steel Products, Inc. v. NLRB, 445 F. 2d 1350 (4th Cir. 1971), nor this opinion directs the Board to hold an election. Consequently, the Board had no occasion to assert in this case the position it took in Peerless and Ft. Smith.

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9. In support of its motions, the Board argued that AFL v. NLRB, 308 U.S. 401 (1940), precluded direct review of an election proceeding.

It is one thing for the Board to assert its own authority to reinstate a representation petition and order an election under § 9(c) of the Act, as it has done here. It is quite another proposition for the Board to question a court's exercise of similar authority, as it did in Peerless and Ft. Smith. The Board's positions are complementary, not inconsistent.

The company filed a number of objections to the second election charging that the union's misconduct affected the election. We find no error in the Board's disposition of these issues without an evidentiary hearing. Cf. NLRB v. Americana Nursing Home, 459 F. 2d 26 (4th Cir. 1972); Intertype Co. v. NLRB, 401 F. 2d 41 (4th Cir. 1968).

Order enforced.

Appendix 8

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 74-1077

GENERAL STEEL PRODUCTS CO.,
A DIVISION OF THE SENG COMPANY,

Petitioner,

-v-

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ORDER

Upon consideration of the petition for rehearing filed by the General Steel Products Co.,

With the concurrence of Judge Russell and Judge Widener,

IT IS ADJUDGED and ORDERED that the petition for rehearing is denied.

/s/ John D. Butzner, Jr.
United States Circuit Judge

FILED Nov. 4, 1974, William K. Slate, II, Clerk

GENERAL STEEL PRODUCTS CO.,
A DIVISION OF THE SENG COMPANY

207 NLRB No. 112
85 LRRM 1003

Decided
Dec. 13, 1973

NATIONAL LABOR RELATIONS BOARD
DECISION AND ORDER

Upon a charge filed on June 5, 1973, by Upholsters' International Union of North America, AFL-CIO, herein called the Union, and duly served on General Steel Products Co., a Division of the Seng Company, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 11, issued a complaint on July 3, 1973, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge,

complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on April 11, 1973, following a Board election in Case 11--RC--2022 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate; 1/

1/ Official notice is taken of the record in the representation proceeding, Case 11--RC--2022, as the term "record" is defined in Secs. 102.68 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended. See LTV Electrosystems, Inc., 166 NLRB 938, enfd. 388 F2d 683 (C.A. 4, 1968); Golden Age Beverage Co., 167 NLRB 151, enfd. 415 F.2d 26 (C.A. 5, 1969); Intertype Co. vs. Penello, 269 F.Supp. 573 (D.C. Va., 1967); Follett Corp., 164 NLRB 378, enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

and that, commencing on or about April 26 and May 22, 1973, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On July 16, 1973, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On July 31, 1973, counsel for the General Counsel filed directly with the Board a Motion to Strike Affirmative Defenses and for Summary Judgment. Subsequently, on August 8, 1973, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a reply to Notice to Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer and defenses to the complaint, and reply to the Notice to Show Cause, the Respondent alleges (1) that there are substantial issues of material fact which cannot be resolved without a hearing and which have not been properly resolved by the Regional Director in representation Case 11--RC--2022, and (2) that there are substantial policy questions and doubt as to the Board's authority to conduct the election upon which the Board's certification was based. The General Counsel, on the other hand, contends that the

Respondent is attempting to relitigate representation case issues adversely decided against it and that it may not do so herein. Further, he argues that the Board had authority to reinstate the dismissed petition in Case 11-RC--2022 and thereafter to direct the election thereon leading to the Union's certification. We agree with the General Counsel's position.

Our review of the record, in pertinent part, reflects that pursuant to the Regional Director's Decision and Direction of Election of October 6, 1964, in Case 11-RC--2022, a secret ballot election in the appropriate production and maintenance unit was conducted on November 6, 1964. The Union lost the election. After the investigation of the Union's timely objections to the election, the Regional Director issued a Supplemental Decision and Direction and thereafter ordered a consolidated

hearing to be held before a Trial Examiner.2/ Following the issuance of the Trial Examiner's Decision the Board, on March 11, 1966, issued its Decision and Order (157 NLRB 636) in which, inter alia, it directed the Respondent to bargain collectively with the Union, dismissed the petition in Case 11--RC--2022, and vacated all proceedings therein. The unfair labor practice aspects of the consolidated hearing were considered by the United States Court of Appeals for the Fourth Circuit (398 F.2d 339) and by the U. S. Supreme Court (395 U.S. 575) which remanded the case for additional findings by the Board.

Pursuant to the remand, the Board on December 12, 1969, issued its Supplemental Decision and Order (180 NLRB 56) in which it again

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2/ The title of "Trial Examiner" was changed to "Administrative Law Judge" effective August 19, 1972.

ordered the Respondent to bargain collectively with the Union. Subsequently, the United States Court of Appeals for the Fourth Circuit declined to enforce the Board's bargaining order and remanded the case for the taking of additional evidence (445 F.2d 350). On remand, a hearing was held before an Administrative Law Judge who issued a Supplemental Decision on Remand. Thereafter, in its Second Supplemental Decision, Order, and Direction of Second Election (199 NLRB No. 121) of October 19, 1972, the Board, inter alia, affirmed the Administrative Law Judge's finding that a bargaining order was unnecessary, ordered that the petition in Case 11--RC--2022 be reinstated, and remanded the case to the Regional Direction to conduct a new election.

On January 26, 1973, a majority of the employees in the appropriate unit voted for the Union. The Respondent filed timely objections to

conduct affecting the results of the election which alleged, in substance, that (1) a union supporter carried a pistol into the plant; (2) an employee's friend threatened a supervisor; (3) a union organizer talked to employees waiting in line to vote; (4) intoxicated employees were allowed to vote and interfere with others; (5) the Union distributed a letter to employees making misrepresentations concerning the pay and benefits received by employees of a competing company organized by the Upholsterers' Union; and (6) the Board had no power, sua sponte, to reinstate, on October 19, 1972, the petition in the underlying representation proceeding which it had previously dismissed on March 11, 1966, and therefore the second election based on the reinstated petition was a nullity.

After investigation, the Regional Director on April 11, 1973, issued his Third Supplemental

Decision and Certification of Representative in which he overruled the Respondent's objections in their entirety and certified the Union. The Respondent timely filed a request for review in which it reiterated its objections and requested a hearing to resolve conflicts of facts raised by its objections. On May 9, 1973, the Board denied the request as raising no substantial issue warranting review.

In support of its request for an evidentiary hearing on its objections, the Respondent has attached to its reply to the Notice To Show Cause eight affidavits. Six of the affidavits had previously been submitted to the Regional Director in the underlying representation proceeding, the seventh contained additional evidence previously given orally to the Regional Director by an affiant who also had filed an earlier affidavit with the Regional Director, and the eighth contained

additional facts, pertaining primarily to Objection 1, not discovered by the Respondent until after the Regional Director's Third Supplemental Decision. Since the evidence in the first seven affidavits had been previously considered by the Regional Director in his ruling on the Respondent's objections, it does not consitute newly discovered or previously unavailable evidence warranting relitigation of the representation case issues decided against the Respondent. As to the eighth affidavit, there is no showing that, with due diligence, the evidence contained therein could have been discovered in timely fashion and therefore it does not constitute newly discovered or previously unavailable evidence. Further, assuming arguendo the evidence is newly discovered, it appears at best to be primarily cumulative evidence with respect to the Respondent's Objection 1 and would not warrant reversing the Regional

Director's determinations on the objections---determinations which we now reaffirm. Further, in its request for review of the Regional Director's Third Supplemental Decision, we note that the Respondent sought a hearing. By our denial of review because no substantial issues warranting review had been raised, we have necessarily determined by implication that no hearing is warranted or required. 3/

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been

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3/ See Baker Canning Company, 206 NLRB No. 97, and cases cited in fn. 2.

litigated in a prior representation proceeding. 4/

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer or adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly grant the Motion for Summary Judgment. 5/

4/ See Pittsburgh Plate Glass Co. v. N.L.R.B. 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

5/ In view of our determination herein, we find it unnecessary to rule upon the General Counsel's motion to strike affirmative defenses.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of the Respondent

Respondent, a Delaware corporation, owns and operates a plant located at High Point, North Carolina, where it is engaged in the manufacture of metal components for furniture. During the past calendar year, a representative period, Respondent purchased and caused to be shipped directly to its High Point, North Carolina, plant goods and raw materials valued in excess of $50,000. During this same period Respondent manufactured, sold and shipped goods valued in excess of $50,000 directly to points outside the State of North Carolina.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2 (6) and (7) of the Act, and

that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Upholsterers' International Union of North America, AFL-CIO, is a labor organization with the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Representation Hearing

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees at the Employer's High Point, North Carolina, plant, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

2. The certification

On January 26, 1973, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 11 designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on April 11, 1973, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request to Bargain and Respondent's Refusal

Commencing on or about April 22 and May 22, 1973, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-

described unit. Commencing on or about April 26 and May 23, 1973, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since April 26, 1973, and at all times thereafter refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in Section III above, occurring in connection with its operations described in Section I above, have a

close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial

period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See Mar-Jac Poultry Company, Inc., 136 NLRB 785; Commerce Company d/b/a Lamar Hotel, 140 NLRB 226, 229, enfd. 328 F.2d 600 (C.A. 5, cert. denied 379 U.S. 817; Burnett Construction Company, 149 NLRB 1419, 1421, enfd. 350 F.2d 57 (C.A. 10).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. General Steel Products Co., a Division of the Seng Company, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Upholsterers' International Union of North America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees at the Employer's High Point, North Carolina, plant, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since April 11, 1973, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about April 26 and May 23, 1973, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in

and is engaging in unfair labor practices within the meaning of Section 8(a) (5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section (8) (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, General Steel Products Co., a Division of the Seng Company, its officers,

agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Upholsterers' International Union of North America, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees at the Employer's High Point, North Carolina, plant, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its High Point, North Carolina, plant copies of the attached notice marked "Appendix". 6/ Copies of said notice, on forms

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6/ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

provided by the Regional Director for Region 11 after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 11, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. December 13, 1973.

s/ Howard Jenkins, Jr.
s/ Ralph E. Kennedy
s/ John A. Penello

NATIONAL LABOR RELATIONS BOARD

NATIONAL LABOR RELATIONS BOARD
Office of the General Counsel
Washington, D. C. 20570

August 22, 1973

Kenneth J. Carrick, Clerk
United States Court of Appeals
for the Seventh Circuit
219 South Dearborn Street - 27th Floor
Chicago, Illinois 60604

Re: No. 72-1730 - Peerless of America, Inc. v. N.L.R.B. (C.A. 7); Board Case 14-CA-6043

Dear Mr. Carrick:

On August 3, 1973, this Court (per Judges Hastings, Cummings and Stevens) handed down its decision enforcing in part and denying enforcement in part the Board's order on review before it. The Board mailed its proposed judgment to the Court on August 14.

We would like to call the Court's attention to what we believe to be an error in the opinion. Apparently in view of the fact that the Court refused to enforce the Board's bargaining order, the Court stated in its last sentence "The case is otherwise remanded to the Board for the expeditious scheduling of a representation election". However, the election petition filed by the Union

involved in this case was dismissed by the Regional Director when the complaint issued in the unfair labor practice case. Thus, there is no election petition now pending in this matter. Moreover, Board action in representation proceedings are not reviewable directly, even if, as was not the case here, they had been consolidated before the Board with a pending unfair labor practice proceeding. See AFL v. N.L.R.B., 308 U.S. 401 (1940); American Broad Co. v. N.L.R.B., 411, F.2d 147, 156 (C.A. 6, 1969).

For these reasons, our proposed judgment made no mention of the last sentence in the Court's opinion. However, we believe, in order that the record may be accurately reflected and to avoid possible confusion in the reading of the opinion, that the last sentence should be stricken.

Sincerely yours,

/s/

Patrick Hardin
Associate General Counsel

UNITED STATES COURT OF APPEALS
Seventh Circuit

September 6, 1973

Mr. Patrick Hardin
Associate General Counsel
National Labor Relations Board
Washington, D. C. 20570

Re: No. 72-1730
Peerless of America, Inc. v. NLRB

Dear Mr. Hardin:

Thank you for your letter of August 22 to our Clerk Kenneth Carrick, who referred it to me as the author of the opinion herein. The panel did not realize that the election petition had been dismissed and that none is now pending. Therefore, in accordance with your suggestion, concurred in by Lawrence H. Cohen, attorney for the petitioner, we are entering an order today deleting the last sentence from the opinion.

The proposed judgment you mailed us on August 14th was executed yesterday by myself and Judge Stevens. Since your proposed judgment contained no signature line for a third judge, we did not ask Judge Hastings to execute it. If the lack of the third signature line was an inadvertent error on the Board's part, kindly

return the executed proposed judgment to me, so that I may obtain Judge Hastings' signature.

Very truly yours,

/s/

Walter J. Cummings

Appendix 36

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 6, 1974

Before

Hon. John S. Hastings, Senior Circuit Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. John Paul Stevens, Circuit Judge

PEERLESS OF AMERICA, INC., Petitioner, vs. NATIONAL LABOR RELATIONS BOARD, Respondent.	) On Petition to) Review and Cross) Application for) Enforcement of an) Order of the) National Labor) Relations Board

ORDER

Having been advised that the Union's election petition is no longer pending, and with the concurrence of both parties,

IT IS HEREBY ORDERED that the last sentence of this Court's opinion of August 3, 1973 is stricken therefrom.

FILED
DEC 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-694

GENERAL STEEL PRODUCTS COMPANY,
A DIVISION OF THE SENG COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE AMERICAN RETAIL FEDERATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1974

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE AMERICAN RETAIL FEDERATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE AMICUS CURIAE*

The American Retail Federation is an organization composed of seventy-eight national and state retail associations. The membership of these associations consists of a wide variety of retail businesses ranging in size from small local stores to large national chains, representative of all respects of the retail industry. Through these associations, the Federation represents

* This brief in support of the petition for a writ of certiorari is being filed with written consents of all parties to this proceeding. Pursuant to Supreme Court Rule 42(1), said written consents have been lodged with the Clerk of the Court.

approximately eight hundred thousand retailers with close to six million employees. The Federation was an *amicus* in the instant case, and participated in oral argument, before the Court of Appeals.

The decision of the court below—permitting the Labor Board, for the first time in the four decades of its administration of the Act, the power to conduct a representation election in the absence of a viable election petition—presents a recurrent question of substantial interest to the Federation's membership. *First*, Section 9(c)(1) of the Act expressly requires that representation elections may be held only upon a legally sufficient petition having been filed by a union, group of employees, or employer. Absent such a petition, the Board may not conduct an election. By permitting the Board to order an election here, where there was no such petition pending, the Court of Appeals emasculated this plain requirement of the Act. *Second*, where, as here, the Board renounces the election process and seeks a bargaining order, and thereafter either a court or the Board itself determines that such an order is not warranted, that should end the matter. An employer should not be put to additional penalization or an attempt by the Board to secure indirectly what it cannot obtain directly.

ARGUMENT

This case, as the court below recognized (Pet. App. 2-4), has had a long and checkered history. From 1964 to 1966, an election petition was pending which was dismissed by the Board itself when it issued a bargaining order (157 NLRB No. 59); from 1966 to 1972, the Board pursued the bargaining order route and ignored the election petition until, after it finally concluded that the Company had been correct throughout and no bargaining order was, in fact, justifiable, it then reverted (199 NLRB No. 121) on its own initiative to the election course it had earlier forsworn. The question presented here is the

Board's authority to deviate from one representation approach to another in such a cavalier and inconsistent manner and to impose, where a bargaining order is found not to be warranted, an alternative penalty: reinstatement of a previously-dismissed election petition.

1. The Board, of course, has no power to issue "punitive" orders. *Local 60, U. B. of C. & J.* v. *N. L. R. B.*, 365 U. S. 651, 655 (1961). In the circumstances of this case, the Board's reinstatement of the election petition was punitive. It was an attempt to secure a lesser penalty when the Board's first choice of remedy, a bargaining order, had been found wanting. There is no basis, however, where an employer has been absolved of liability under section 8(a)(5) of the Act, to order *any* remedy. The union is free to file, if it so desires, a new petition. For the Board to take such action on its own, absent such an affirmative step by the union, is to impose indirectly the very post-*Gissel*[1] approach condemned by numerous courts of appeals.[2] It penalizes an employer, apparently in a misguided attempt to promote collective bargaining,[3] where that employer is not guilty of any violation of the Act. Indeed, the present case goes even *further* than the requirement of the District of Columbia Court of Appeals in *Linden Lumber*[4] that an employer who rejects an authorization card based bargaining demand must file an election petition if he refuses recognition and commits no

1. *N. L. R. B.* v. *Gissel Packing Co., Inc.*, 395 U. S. 575 (1969).

2. See, *e.g.*, *N. L. R. B.* v. *American Cable Systems, Inc.*, 427 F. 2d 446 (5th Cir. 1970), *cert. denied*, 400 U. S. 597 (1970); *N. L. R. B.* v. *General Stencils, Inc.*, 438 F. 2d 894 (2nd Cir. 1971); and *N. L. R. B.* v. *Gibson Products Co.*, 494 F. 2d 762 (5th Cir. 1974).

3. See, *e.g.*, *N. L. R. B.* v. *Savair Mfg. Co.*, 414 U. S. 270, 94 S. Ct. 495, 499 (1973) ("the Act is wholly neutral when it comes to that choice [of unionization]"); and Summers, *Freedom of Association and Compulsory Unionism in Sweden and the United States; a Comparative Study*, 112 U. Pa. L. Rev. 647, 665-67, 694-95 (1964).

4. *Truck Drivers Union Local 413* v. *N. L. R. B.*, 487 F. 2d 1099 (D. C. Cir. 1973), *cert. granted sub nom., Linden Lumber Division, Summer & Co.* v. *N. L. R. B.* (No. 73-1231).

election-interfering unfair labor practices. The Board in *Linden* (which is now on certiorari pending decision by this Court) professed not to have the power to require an employer to file an election petition. *A fortiori,* it is submitted, the agency cannot direct an election without any viable petition on file at all.

2. The Board, moreover, as the Petition (p. 9 n. 2) demonstrates, has taken a virtually unprecedented step in the instant case which it has heretofore declined to take with respect to other similarly-situated employers. Apart from the questionable validity of its actions under section 9(c)(1) of the Act, the violence to finality in administrative process, and the inconsistency with representations of the Board before various appellate courts (See Pet., pp. 9-15), the Board must surely "explain its imposition of a remedy in one case and its failure to do so in a seemingly similar [situation]" *N. L. R. B.* v. *General Stencils, Inc.*, 438 F. 2d at 905; see also *N. L. R. B.* v. *Metropolitan Life Ins. Co.*, 380 U. S. 438 (1965). It has failed to comport with this requirement in the instant case.

3. When an election petition is "blocked" by an apparently meritorious refusal to bargain charge, the Board's practice is that followed here—dismissal of the petition under section 11730.4(d) of the Board's public policy manual. The petition is no longer considered pending (Pet. App., p. 34) nor otherwise held in abeyance. The dismissal is, as it was here, final and unconditional. It is not subject, as the Board proposes here, to a condition subsequent: reinstatement if there is a failure to prove an unfair labor practice. This radical departure from the agency's own rules warrants review by this Court.

CONCLUSION

This case presents an important and recurrent question in the administration of the Act. For the reasons described above, as well as those set forth in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-694

GENERAL STEEL PRODUCTS COMPANY,
A DIVISION OF THE SENG COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 503 F.2d 896. The Board's decision and order (Pet. App. 10-32) are reported at 207 NLRB No. 112.

JURISDICTION

The decision of the court of appeals was rendered on October 1, 1974 (Pet. App. 1), and a timely petition for rehearing was denied on November 4, 1974 (Pet. App. 9). The petition for a writ of certiorari was filed on December 4, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board had power to reinstate a previously dismissed valid election petition upon finding, pursuant to a court of appeals remand, that a card-based bargaining order was no longer appropriate since a fair rerun election could then be held.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 3-4.

STATEMENT

On August 14, 1964, the Union[1] filed a representation petition under Section 9(c)(1) of the Act 29 U.S.C. 159(c)(1) (Case No. 11-RC-2022), which led to an election among petitioner Company's employees, which the Union lost. The Union filed objections to the election and unfair labor practice charges. The Board set aside the election because of the Company's violation of Section 8(a)(1) of the Act, and held that, since the Union then had authorization cards from a majority of the employees, the Company, in refusing to bargain, had violated Section 8(a)(5). The Board, *inter alia*, directed the Company to bargain with the Union, and dismissed the representation petition. 157 NLRB 636.

The court of appeals upheld the Board's order setting aside the election, but denied enforcement of the bargaining order. 398 F.2d 339 (C.A. 4). In *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, this Court reversed the latter action, but remanded the case to

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[1]Upholsterers' International Union of North America, AFL-CIO.

the Board because it had not made a finding that (*id.* at 616):

> even though traditional remedies might be able to ensure a fair election, there was insufficient indication that an election (or a rerun in *General Steel*) would definitely be a more reliable test of the employees' desires than the card count taken before the unfair labor practices occurred.

Pursuant to this remand, the Board issued a supplemental decision (180 NLRB 56) again ordering the Company to bargain with the Union. The court of appeals again declined to enforce the Board's bargaining order (445 F.2d 1350), and remanded the case to the Board, directing it (*id.* at 1356):

> * * * not to limit its inquiry to events occurring prior to the first unfair labor practice hearing but [to] receive proof of any material fact occurring up to the date of the new hearing bearing upon a determination whether or not a fair [rerun] election could be held.

On the second remand, the Board found that, in the light of changed conditions, a bargaining order was no longer necessary since a fair election could then be held. It ordered that the petition in Case No. 11-RC-2022 be reinstated, and directed a new election thereon. 199 NLRB 859. In that election, a majority of the employees in the appropriate unit voted for the Union. The Company filed objections to alleged Union misconduct affecting the election, and also asserted for the first time that the Board lacked authority to reinstate the petition. The objections were overruled, and the Union was certified as the employees' representative (Pet. App. 16-18).

Following certification, the Company refused the Union's request to bargain; a complaint issued on the Union's charge alleging that the Company had violated Section 8(a)(5) and (1) of the Act; and the Board, granting the General Counsel's motion for summary judgment, sustained the allegations of the complaint. The Board ordered the Company to bargain with the Union. (Pet. App. 10-32.)

The court of appeals enforced the Board's order, holding that the Board did not exceed its authority in reinstating the election petition[2] (Pet. App. 1-8).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decision of any other court of appeals. For these reasons, and since the issue presented is not important in the administration of the Act, further review is not warranted.

1. It is uncontested that the Union's 1964 representation petition was valid and fulfilled the requirements of Section 9(c)(1) of the Act. The Company contends, however, that the Board, having dismissed that petition, lacked authority *sua sponte* to reinstate it. The court below properly rejected this contention. As the court stated (Pet. App. 5-6):

> The Board's * * * entry of a bargaining order based on a card count * * * appeared to make the election petition superfluous and the Board dismissed it. When the bargaining order was ultimately determined to have been erroneously granted, the election petition became an appropriate instrument for determining

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[2]The court of appeals also held that the Board properly disposed of the Company's other election objections without an evidentiary hearing (Pet. App. 8), and the Company does not challenge that holding here.

the question of representation over which the parties had been continuously litigating.

The Board's correction of its error was not limited to vacating the bargaining order which this court had declined to sustain. It could go further and reinstate the election petition which it had improvidently dismissed on the mistaken assumption that its bargaining order was enforceable.

The court's holding that the Board was thus empowered to correct its error is an application of the principle, first enunciated in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145, and recently reaffirmed in *National Labor Relations Board* v. *Food Store Employees Union*, 417 U.S. 1, 9, that:

> * * * an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge.

2. Contrary to petitioner's contention (Pet. 11-15), the decision below is not inconsistent with *Peerless of America, Inc.* v. *National Labor Relations Board*, 484 F.2d 1108 (C.A. 7), or *Fort Smith Outerwear, Inc.* v. *National Labor Relations Board*, 499 F.2d 223 (C.A. 8). There, the courts refused to enforce Board bargaining orders, and then remanded to the Board for the expeditious scheduling of a representation election. When Board counsel later advised the courts that they lacked jurisdiction to direct a representation election (*American Federation of Labor* v. *National Labor Relations Board*, 308 U.S. 401), the election requirements were deleted. The court of appeals here, however, did not direct the Board to hold an election, but only to determine whether a fair election could be held. 445 F.2d at 1356. As the court of appeals concluded (Pet. App. 8):

> It is one thing for the Board to assert its own authority to reinstate a representation petition and order an election under §9(c) of the Act, as it has done here. It is quite another proposition for the Board to question a court's exercise of similar authority, as it did in *Peerless* and *Ft. Smith.* The Board's positions are complementary, not inconsistent.[3]

There is no inconsistency between the decision below and *Linden Lumber Division* v. *National Labor Relations Board,* No. 73-1231, decided December 23, 1974 (see *amicus* brief of American Retail Federation, 3-4). The latter case holds that an employer who has not engaged in unfair labor practices which impair the electoral process can lawfully insist that the union establish its majority status in a Board election, and place the burden of filing a petition on the union. Here, the union did file a petition with the Board, which the Board erroneously dismissed. The Board's later correction of that error cannot in any realistic sense be viewed as shifting the burden of filing a petition from the union to the employer.

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[3]The Board faced a situation similar to that here after the Seventh Circuit's remand in *New Alaska Development Corp.* v. *National Labor Relations Board,* 441 F.2d 491. There, the Board, upon applying the principles enunciated in *Gissel, supra,* and finding that a fair election could then be held, reinstated the representation petition previously dismissed (see 175 NLRB 780) and directed a rerun election pursuant to the reinstated petition. *New Alaska Development Corp.,* 194 NLRB 830.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

PATRICK HARDIN,
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